UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JAROSLAW DUDA, Appellant, v. DEPARTMENT OF VETERANS AFFAIRS, Agency.	DOCKET NUMBER CH122190W0634 DATE: NOV 26 1991

Nelson Rivera, American Federation of Government Employees, Allen Park, Michigan, for the appellant.

Arthur E. LaFave, Esquire, Detroit, Michigan, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant has petitioned for review of an initial decision, issued October 25, 1990, that dismissed the appellant's claim under the Whistleblower Protection Act as outside the Board's jurisdiction. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.117, however, REVERSE the initial decision, and REMAND

the case to the Board's Chicago Regional Office for adjudication on the merits.

BACKGROUND

The agency terminated the appellant's employment as a File Clerk during his probationary period. After seeking corrective action with the Office of the Special Counsel, the appellant brought this individual right of action (IRA) appeal under the Whistleblower Protection Act of 1989 (WPA),[1] claiming that his termination occurred in part because he informed Senator Carl Levin's office of alleged improper activities by his supervisor, and because his fiancee, also employed at the Veterans Administration, engaged in whistleblowing activities with respect to the same supervisor.

At a prehearing conference, the appellant stipulated that the earliest possible day on which he went to Senator Levin's office was after he had received the notice terminating his employment at the agency. The administrative judge found that, under the Board's regulations implementing the WPA, jurisdiction over IRA appeals is limited to

[1] Pub. L. No. 101-12, 103 Stat. 16. The IRA provisions of the Act authorize an employee or applicant for employment to appeal to the Board from specified "personnel actions" that are allegedly threatened, proposed, taken, or not taken because of whistleblowing activities. If the agency action is not otherwise directly appealable to the Board, the appellant must seek corrective action from the Special Counsel before appealing to the Board. See 5 U.S.C. §§ 1214(a)(3), 1221(a); 55 Fed. Reg. 28,593 (1990) (to be codified at 5 C.F.R. § 1209.2). The appellant here sought corrective action from the Office of Special Counsel, which advised the appellant on July 5, 1990, that he had the right to file an IRA appeal to the Board within 60 days. The appellant filed his appeal on August 6, 1990.

"personnel actions ... taken because of the appellant's whistleblowing activities." 55 Fed. Reg. 28,593 (1990) (to be codified at 5 C.F.R. § 1209.2(b)(1)). Because the appellant had withdrawn the only allegation of whistleblowing pertaining to himself, the administrative judge found that the regulatory basis for his IRA no longer existed, and dismissed the appeal for lack of jurisdiction.[2]

ANALYSIS

The Board has not previously considered whether an employee who has not made a protected disclosure may be covered by the Whistleblower Protection Act where a personnel action is taken against him because of his relationship with an employee who has made a protected disclosure. We considered a very similar issue, however, in *Special Counsel v. Department of the Navy*, 46 M.S.P.R. 274 (1990). We there held that the protections provided in 5 U.S.C. § 2302(b)(8)[3]

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[2] The appellant has not objected in his petition for review to the administrative judge's finding that his stipulation regarding the timing of his disclosure to Senator Levin's office removed that allegation as a basis for an IRA appeal. That matter, therefore, is no longer at issue in this appeal.

[3] Section 2302(b)(8), as amended by the WPA, states in pertinent part:

> (b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority--
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> (8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of--
>
> (A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences--

apply where a retaliatory personnel action is taken against an employee believed to have engaged in protected activity even though the employee may not actually have done so. *Id.* at 280. We find that each of the bases for our holding in *Special Counsel v. Navy* is applicable to the instant case, and we hold that the WPA prohibits an agency from taking a personnel action against one person because of his relationship with another employee who has made a protected disclosure.[4]

In *Special Counsel v. Navy*, we first found that the plain language of the WPA does not limit the protections of the statute to employees who actually make protected disclosures. The statute prohibits an agency official from taking a personnel action against "any" employee because of a disclosure of information by "an" employee. *See* 5 U.S.C. § 2302(b)(8); 46 M.S.P.R. at 278. Taking a personnel action against one employee because of whistleblowing by another employee would thus fall within the ambit of the statutory prohibition.

The second basis for our holding in *Special Counsel v. Navy* was a consideration of the legislative purposes to be accomplished. We noted that the stated purposes of the WPA --

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> (i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety ....

[4] As *Special Counsel v. Navy* was issued after the administrative judge issued his initial decision, he did not have the benefit of the Board's reasoning in that case.

"to strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing in the Government"[5] -- do not evince any intent to limit statutory protection to those individuals who actually make protected disclosures. 46 M.S.P.R. at 278. In addition, we observed that the legislative history of the WPA shows that a primary purpose of the Act was to encourage whistleblowers, and found that a failure to provide employees with the protections of the WPA where agency officials have taken personnel actions against them based on the belief that the employees had made protected disclosures would discourage other employees from making protected disclosures. *Id.* at 278-79. Similarly, a failure to protect an employee from retaliation based on his relationship with another employee who has engaged in whistleblowing would similarly discourage other employees from making protected disclosures.

The third basis for our holding in *Special Counsel v. Navy* was its consistency with court interpretations of other Federal statutes, including 42 U.S.C. § 2000e-3(a), that prohibit retaliation against employees for protected activity. 46 M.S.P.R. at 279. Courts have similarly construed section 2000e-3(a) as protecting employees from "third-party" reprisals, i.e., discrimination against one person because of a friend's or relative's protected activities. *See Mandia v. Arco Chemical Co.*, 618 F. Supp. 1248, 1250 (W.D. Pa. 1985);

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[5] Whistleblower Protection Act of 1989, Pub. L. No. 101-12, § 2(b), 103 Stat. 16.

Kent v. R.J. Reynolds Tobacco Co., 27 Fair Empl. Prac. Cas. (BNA) 1628, 1633-34 (E.D. La. 1982); *De Medina v. Reinhardt*, 444 F. Supp. 573, 580 (D.D.C. 1978).

The Board's recently promulgated regulation at 5 C.F.R. § 1209.2 does state that an IRA appeal relates to personnel actions taken "because of the appellant's whistleblowing activities." This portion of the regulation appears to be merely a summary of the authorizing statutory provision, however, rather than an interpretation of the scope of the statutory protection.[6] Because we find that retaliation against one employee because of another employee's whistleblowing falls within the plain language of the statutory prohibition, and because we find that a contrary construction would be inconsistent with legislative intent and the construction of similar statutes, we decline to apply a literal reading of section 1209.2. *Cf. Johnson v. Department of Justice*, 30 M.S.P.R. 141, 142 (1986) (in the absence of a specific statutory basis for imposing a one-year time limit for filing a mixed appeal, the Board determined that it would not enforce a regulation imposing such a limit).

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[6] The regulation states that IRAs "are authorized by 5 U.S.C. § 1221(a) with respect to personnel actions listed in § 1209.4(a) of this part that are allegedly threatened, proposed, taken, or not taken because of the appellant's whistleblowing activities." The explanation accompanying the issuance of the Board's whistleblower regulations contains no discussion of whether the WPA protects only those employees who have themselves engaged in whistleblowing activity. *See* 55 Fed. Reg. 28,591-92 (July 12, 1990).

ORDER

Accordingly, we REMAND the case to the Chicago Regional Office for an adjudication of the merits of the appellant's Individual Right of Action appeal.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.